IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1857

IN RE DOMINIC BLASI, A WITNESS BEFORE THE SPECIAL SEPTEMBER 1978, GRAND JURY,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Justices Of The Supreme Court Of The United States:

Petitioner, Dominic Blasi, respectfully prays that a Writ of Certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit affirming a judgment of the United States District Court for the Northern District of Illinois finding Petitioner in contempt for failure to respond to questions before the Grand Jury and ordering him incarcerated until he should purge himself of that contempt.

Petitioner was subpoenaed to testify before the Special September, 1978, Grand Jury. He refused to respond to questions put to him, invoking his right to silence under the Fifth Amendment to the United States Constitution. He was subsequently granted immunity pursuant to 18 U.S.C. Sections 6002 and 6003. After having received this grant of immunity, Petitioner persisted in refusing to answer questions propounded to him by the Grand Jury, relying upon his right to silence as guaranteed under the Fifth Amendment. The Government petitioned the court to find Respondent in contempt for this refusal to answer. The District Court, without granting Petitioner an evidentiary hearing of any kind, and without making any findings of fact, ordered Respondent into custody of the United States Marshall until such time as he agreed to answer questions propounded by the Grand Jury, or until the term of the Grand Jury expired, but in no event longer than 18 months.

The United States Court of Appeals for the Seventh Circuit affirmed this judgment. It held that the factual and legal issues presented were not of such complexity as to require an evidentiary hearing.

OPINIONS BELOW

The District Court issued no opinion. The minute order embodying the judgment of the District Court is reproduced as Appendix "A" to this Petition. The United States Court of Appeals for the Seventh Circuit affirmed the decision of the District Court in an order which was not published. This order is reproduced as Appendix "B" to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its order on March 16, 1979. The jurisdiction of this Court rests on 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether it is a violation of due process of law to commit a witness to jail for contempt of court for refusing to answer questions propounded by a special grand jury without affording him an evidentiary hearing.

2. Whether it is a violation of the Fifth and Sixth Amendments to the United States Constitution to deny a witness before a grand jury the right to have counsel accompany him into the grand jury room.

3. Whether the "use" immunity under 18 U.S.C., §§ 6002 and 6003 is equivalent to the privilege to remain silent guaranteed by the Fifth Amendment to the United States Constitution.

4. Whether the exception from prosecution for perjury or false statement contained within a grant of immunity to a grand jury witness under 18 U.S.C., §§ 6002 and 6003 is equivalent to the privilege to remain silent guaranteed by the Fifth Amendment to the United States Constitution.

STATEMENT OF FACTS

Petitioner was served with a subpoena requiring him to appear before the Special September, 1978, Grand Jury. He did appear in response to that subpoena but refused to answer questions propounded to him, citing his right to silence as guaranteed by the Fifth Amendment to the Constitution. On the date that he appeared and refused to answer questions, the United States Attorney appeared before the District Court and presented a petition for an order granting Petitioner immunity, pursuant to Title 18 U.S.C., §§ 6002-6003. that petition, which was not verified, nor supported by affidavit, recited that the Grand Jury was conducting an investigation "of alleged illegal activities in this district, involving, among others, association with and conducting the affairs of an enterprise through a pattern of racketeering activity, that is, murder in violation of state law." The petition went on to recite that Petitioner's testimony "is necessary to the public interest, as is the production of books, papers or other evidence he may have in his possession or control." The subpoena which had been served on Petitioner had not requested the production of any documents. The District Court entered the order granting Petitioner immunity, refusing to allow Petitioner to argue in opposition to that grant, stating that there would be plenty of time to raise any issues and to have a full hearing should the Petitioner refuse to testify despite the immunity.

Petitioner returned to the Grand Jury room and again refused to respond to questions put to him. On that same date, the United States Attorney returned to the District Court, orally informing the court that Respondent

refused to answer questions and made an oral motion for Rule to Show Cause why Petitioner should not be held in contempt. The District Court ordered the United States Attorney to file a written petition and set a hearing on it seven days later. Petitioner's counsel did not receive a copy of the written petition until two days before that hearing.

On the day before the hearing on the petition, counsel for Respondent moved to continue the hearing for a period of fourteen days in order to prepare a defense. The court ordered counsel for Petitioner to file a response to the written Petition for Rule to Show Cause within two days.

Counsel for Petitioner filed their response within the time ordered by the court in which they raised the following issues among others:

A. The grant of immunity given to the Respondent was not co-extensive with his Fifth Amendment right in that it subjected him to possible allegations and criminal charges for alleged offenses of perjury and false statement.

B. Requiring the witness to appear and answer without advance warning of the subject of the investigation subjected him to an unreasonable risk of criminal prosecution for either perjury or false statement.

C. Requiring him to appear and answer questions without advance information as to the subject matter without the right to counsel violated his rights under the Fifth and Sixth Amendments to the United States Constitution.

D. Counsel for the United States had informed counsel for Petitioner that the government had made an extensive investigation of the subject matter under Grand Jury investigation, that he knew the "facts" surrounding the investigation and

that if Respondent did not testify to the "truth" as known by counsel for the government, the government would vigorously pursue a prosecution for perjury against him.

The memorandum filed by counsel for Petitioner in support of this response requested an evidentiary hearing and set forth the basis for that hearing. Among the reasons assigned was that the pressures placed upon a witness before the Grand Jury could well cause him to err in his testimony even though he was trying to answer truthfully. Thus, the result of his answers, even though honestly given, could lead the government to bring a charge of perjury or false statement because those answers differed with the government's view of the facts of the situation.

When the matter next came before the District Court, counsel for Petitioner specifically requested an evidentiary hearing. The District Court refused to allow Petitioner to introduce any evidence whatsoever. During colloquy before the court, counsel for Petitioner stated that they wished to present expert testimony as to the psychology of recall, a discussion of how memory works in the human mind, particularly in regard to a statement by a witness that may be incorrect even though he honestly believes the answer to be true, because of the nature of the memory process. The District Court rejected tender of this evidence.

The District Court again ordered Petitioner to appear before the Grand Jury. The Petitioner did appear, and again refused to respond to questions put to him. He was again brought to the District Court on that same date. Again, counsel for Petitioner requested an evidentiary hearing. Again, the District Court refused. The court and counsel proceeded to chambers, where the court

reporter from the Grand Jury read the questions which had been asked of Respondent before the Grand Jury that morning. The District Court thereupon entered an order committing Petitioner to the custody of the United States Marshall, "for incarceration until you shall have determined to obey the order or until the Grand Jury shall have discontinued its investigation of this matter," but in no event longer than eighteen months. The District Court refused to stay the execution of its order.

An appeal was taken to the United States Court of Appeals for the Seventh Circuit. The Court of Appeals affirmed the decision of the District Court. While recognizing that a witness who is faced with a petition for contempt should be given a "meaningful opportunity to raise his claims and have them determined by the court," the Court of Appeals held that an evidentiary hearing is appropriate only if the witnesses' defense raises legal or factual issues of some complexity. The Court of Appeals found that the issues raised in this case were not of such complexity as to require an evidentiary hearing. It held that the contempt proceedings below did not violate due process.

REASONS FOR GRANTING THE WRIT

I.

THE DENIAL OF AN EVIDENTIARY HEARING TO PETITIONER VIOLATED HIS RIGHT TO DUE PROCESS OF LAW.

Petitioner has been jailed. No specific order finding him in contempt was ever entered by the District Court. While the record leaves little doubt that the court felt him to be in contempt, no formal order to that effect was ever entered. Such failure is indicative of the entire chain of proceedings before the Court. The government was not required to show that the questions posed to Petitioner were pertinent to the subject of inquiry before the Grand Jury, or to make any showing other than that unspecified questions had been asked which Petitioner had refused to answer. Most fundamentally, the District Court refused to grant Petitioner an evidentiary hearing although he requested it at every stage of the proceeding.

The denial of such hearing was based upon the court's theory that counsel did not intend to show specific facts regarding the health or circumstances of Petitioner, but was instead attacking the entire Grand Jury system. The District Court conditioned the right to a hearing upon Petitioner's ability to show in advance of that hearing that he would produce a defense to the Petition. Such an approach turns the Constitution on its head. A more fundamental and flagrant denial of due process hardly can be imagined.

It is a basic tenet of our system that before a person may be jailed for any reason he must be afforded complete due process. In *United States v. Alter*, 482 F.2d

1016, 1023 (1973), it was held that all other considerations must yield "to the paramount due process right of a potential contemnor to have adequate notice and a fair opportunity to defend himself." In *United States v. Dinsio*, 468 F.2d 1392, 1394 (9th Cir. 1972), it was held that an alleged contemnor is entitled to an "uninhibited and adversary hearing" before he may be jailed. It was held there that Rule 42(b) F.R.CR.P. applies in this type of situation and that all of its procedural safeguards must be honored in every case.

This Court has reached the same conclusion on many occasions. In *In Re Oliver*, 333 US 257, 68 S.Ct. 499 (1948), this Court held that in a situation such as this the alleged contemnor has a right to reasonable notice of a charge against him and an opportunity to be heard in his defense, including "as a minimum a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." This Court went on to state that it is "the law of the land that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly in a public tribunal."

This was more recently affirmed in *Harris v. United States*, 382 US 162, 166-67, 86 S.Ct. 353, 355 (1965), where this Court stated:

> "What appears to be brazen refusal to cooperate with the Grand Jury may indeed be a case of frightened silence. Refusal to answer may be due to fear—fear of reprisals of the witness for his family. Other extenuating circumstances may be present . . . . If justice is to be done, a sentencing judge should know all the facts. We can imagine situations where the questions are so inconsequential to the Grand Jury but the fear of reprisal so great that only nominal punishment, if any, is indicated.

> Our point is that a hearing and only a hearing will elucidate all the facts and assure a fair administration of justice. The Courts will not act on surmise or suspicion but will come to the sentencing stage of the proceeding with insight and understanding."

The District Court here flagrantly ignored these fundamental principles. It denied Respondent a hearing based upon its feeling, before any evidence had been introduced whatsoever, that Petitioner could not possibly prevail. How could the court know this unless it had heard evidence? Certainly the right to a hearing cannot be conditioned upon Petitioner's first showing that he would ultimately prevail upon such a hearing. Yet, this is what the District Court required.

The Court of Appeals' decision is clearly at odds with the holdings in the other circuits, specifically the Ninth Circuit. It condititoned the right to an evidentiary hearing on the "complexity" of the legal or factual issues. Without stating why, it merely concluded that the issues presented here were not of such complexity as to require such an evidentiary hearing. How such a decision can be reached without having heard the evidence or testimony is mystifying. The issues presented by Petitioner here were not simple. They went to the very heart of the Constitutional rights of witnesses called before the Grand Jury. They presented issues of great Constitutional magnitude under both the Fifth and Sixth Amendments, as will be more fully developed hereafter. Both Courts below have deprived Petitioner of the basic essentials of due process—the right to be heard and the right to confront their accusers. Absolutely no showing was required of the government other than a conclusory statement that the questions asked were relevant to the investigation and were not answered. Such a holding places it solely within the power of the Grand Jury to

ask any question which it might wish and cause a person to be incarcerated without any showing that the subject matter of the questions was proper. Such an approach turns our Grand Jury, which was designed to protect our citizens, into a star chamber proceeding.

In approving the action of the District Court, the Court of Appeals completely ignored the fact that proceedings such as this are governed by Rule 42(b) of the Federal Rules of Criminal Procedure. This was the holding in *In Re Sadie*, 509 F.2d 1252, 1255 (2nd Cir. 1975), where it was specifically held that a witness before the Grand Jury who persists in his refusal to testify is entitled to the procedural regularities prescribed by that rule. An opportunity to present evidence to attempt to avoid being incarcerated is not a mere technicality. It is the very heart of the concept of due process. Petitioner attempted to introduce expert evidence to lay the factual groundwork for a Constitutional challenge. That is not a meaningless formality. Petitioner was ready, willing and able to present that evidence. He was not given an opportunity to do so. It is obvious that there is a conflict amongst the Circuits as to the rights of potential contemnors in Grand Jury proceedings. The courts below have flagrantly ignored the decisions of this Court which require a full and fair evidentiary hearing. This Court must take this case to declare once and for all that a person may not be jailed without an opportunity to be heard in his own defense.

II.

PETITIONER WAS DENIED THE OPPORTUNITY TO SHOW THAT "USE" IMMUNITY IS NOT EQUIVALENT TO THE FIFTH AMENDMENT.

Petitioner attempted to lay the factual groundwork to show that the use immunity granted under 18 USC, § 6002-6003 is not equivalent to the command of the Fifth Amendment that no person shall "be compelled in any criminal case to be a witness against himself". This Court has held that such command is "an important advance in the development of our liberty—one of the great landmarks in man's struggle to make himself civilized." *Ullmann v. United States*, 350 US 422, 426 (1955). The Fifth Amendment was designed to protect the accused against infamy as well as against prosecution. *Id.* at 450, dissenting opinion of Justice Douglas.

In *Counselman v. Hitchcock*, 142 US 547, 586 (1892), the first case which dealt with an immunity statute in relation to the Fifth Amendment, a unanimous court stated that an immunity statute to be valid must "supply a complete protection from *all the perils* against which the Constitutional prohibition was designed to guard . . ." (Emphasis supplied)

Subsequently, in *Kastigar v. United States*, 406 US 441 (1972), this Court without directly overruling *Counselman*, has held that use immunity was sufficient if indeed both "use and derivative-use immunity is coextensive with the privilege [of the Fifth Amendment]." *Id.* at 459.

Against this background Petitioner below sought to show that use and derivative use immunity is not in fact co-extensive with the rights guaranteed by the Fifth Amendment. Such immunity still subjects a witness to the risk of a future perjury prosecution or prosecution

for false statement. That is not to say that anyone is allowed or entitled to commit perjury. No one would so contend. Nevertheless, the giving of oral testimony is necessarily based on the witness' memory and his powers of observation. This is not a precise phenomenon but one based on a number of variables, namely the reception and registration of a mental impression, the retention or preservation of the previously acquired impression and the reproduction or recall of that impression. The prior decisions on this issue have all been based upon the court's impression without a medical or scientific underpinning. This, of course, is due to the fact that research on the nature of memory and recall is only now beginning to bear fruit. Only within the last few years have studies been conducted which begin to demonstrate the way which memory works.

In *Modern Clinical Psychology* (Sixth Edition, 1977) by Noys and Kolb, it is stated:

> "The function by which data acquired and presented to consciousness through the observations of attention are stored, later to be summoned and again presented to consciousness, known as memory. For the purpose of description, it may be considered as consisting of three processes, the reception and registration of a mental impression; the retention or preservation of the previously acquired impressions; the reproduction or recall of the impression. One must not conclude that memory is a special and more or less isolated faculty. It is but one aspect of that highly integrated part of the behavior of the organism known as mental. It is adjustive in its purpose and tends to promote adaptation with the minimum of effort by virtue of its role in assisting the individual to profit by his experience. Largely as a result of the investigation of abnormal psychology, it is known that memory is influenced by affect, the tendency being to modify it

in the interest of the emotional needs of the individual. (P. 88)

* * *

"Paramnesia, or falsification of memory, as well as distortions of memory also serves as protection against intolerable anxieties. (P. 90)

* * *

"RETROSPECTIVE FALSIFICATION. Of different psychological significance are the retrospective falsifications or illusions of memory, created in response to affective needs. We all tend to embroider the truth in accordance with these needs, or unconsciously to select those memories which suit our interests. Two persons who have intense but different emotional attitudes to a certain event or experience will relate quite different accounts of the circumstances. Both persons may be honest, but each will remember details in harmony with his emotional needs and forget those not consistent with his affects. . . . Defensive distortions of recall may serve to avert threat. . . . (P. 90)

It cannot be doubted that a witness before the Grand Jury in a criminal investigation is under great tension, anxiety and stress. The record in this case shows that the subpoena served on Petitioner did not inform him of the subject matter of the investigation. There is no showing in the record that he was ever informed of this subject matter. Even if he would agree to answer all questions asked, he would still be subject to the problems of recall. He might well answer a question honestly as he remembered, but nevertheless, incorrectly. If he would subsequently be indicted for perjury, he would have the burden of convincing the Judge or jury that he did not intentionally answer the questions falsely. This is the risk that makes the immunity statute—whether it be transactional or use immunity—not co-extensive with the Fifth Amendment privilege.

The witness in this case requested an opportunity to introduce expert testimony on this subject of the nature of the memory as above outlined. The court denied this request. This evidence would lay a foundation for a reconsideration of the rulings in the cases regarding the type of immunity which is required in order to be co-extensive with the Fifth Amendment privilege. It would support the holding in *Boyd v. United States*, 116 US 616, 635 (1885), that "Constitutional provisions for the security of persons and property would be liberally construed." It would enable the court to take a fresh look at the Fifth Amendment, not on the basis of argument, but from the viewpoint of scientific and psychological evidence and facts. The court below denied Petitioner the opportunity to lay this foundation.

Indeed, the Court of Appeals did not even refer to this issue in rendering its decision. To say that this is not a complex issue is to deny all reality.

Nor, was Petitioner's apprehension in this regard unfounded. His attorney was warned by the prosecutor conducting the Grand Jury proceedings, that the government knew the true facts and that unless Petitioner testified in accordance with their perception of these facts he would be prosecuted for perjury. Thus, apprehensions of the fallibility of memory leading to a charge of either perjury or false statement were not abstract ones. Petitioner was specifically faced with an overt threat of the government that unless his recall coincided with the preconceived ideas of the government, he would be prosecuted. To deny him the opportunity to present evidence on this issue is a clear and flagrant violation of due process of law. This Court must declare that no matter how novel the issues presented by the alleged contemnor, he at least has the

opportunity to present them and to substantiate them by evidence which he is prepared to produce. Anything less would be to deprive witnesses before the Grand Jury of any protection whatsoever.

III.

PETITIONER WAS DENIED HIS RIGHT TO COUNSEL.

At his last appearance before the Grand Jury, Petitioner requested permission to have counsel present with him in the Grand Jury room. This was denied. On many occasions before the District Court, counsel explained their reasons as to why they felt their presence was necessary before the Grand Jury. The right to counsel before the Grand Jury has never been decided definitively by this Court. In *United States v. Mandujano*, 425 US 564, 603, 96 S.Ct. 1768, 1789 (1976), Justice Brennan, concurring, stated that this issue had never been decided squarely by this Court. He observed that the decisions of this Court in *Miranda v. Arizona*, 384 US 436, (1966) and *Escobedo v. Illinois*, 378 US 478 (1964), "recognizing the 'substantive affinity' and therefore the 'coextensiveness' in certain circumstances of the right to counsel and the privilege against compulsory self-incrimination" have lead many to question the continuing vitality of older dicta which seem to indicate that a witness is not entitled to counsel while testifying before a Grand Jury.

It is clear that this issue raised by Respondent is not frivolous but is substantial and serious. How the District Court and the Court of Appeals could have concluded that Petitioner would be totally unable to prevail on such a contention is difficult to fathom. In any event, that does not justify the failure to grant a hearing to

allow Petitioner the opportunity to show the factual reasons why such a right to counsel is required.

An examination of the principles at issue here show that the issues are not simple. They are indeed complex. The justification for the wide latitude granted to the Grand Jury has always been that it provides a basic guarantee of individual liberty and a protection to the individual citizen functioning as a barrier to reckless or unfounded charges; that "its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance." *United States v. Mandujano, supra*, at 572, 96 S.Ct. at 1774. However, there is a serious doubt as to whether that historic description of the Grand Jury is accurate or viable today.

The right to counsel is one which this country has cherished from its beginning. It is a right protected not only under the Sixth Amendment, but the due process clause of the Fifth Amendment as well. Thus, in *Moore v. Michigan*, 355 US 155, 78 S.Ct. 191 (1957), this Court observed that the right to counsel is not confined to representation during a trial on the merits of a criminal charge, but rather "where the circumstances show that [a person's] rights could not have been fairly protected without counsel, the due process clause invalidates his conviction." Thus, in *Gideon v. Wainright*, 372 US 335, 83 S.Ct. 792 (1963) this Court reaffirmed the fundamental character of the right to the aid of counsel, holding that one unable to afford retained counsel must have counsel appointed for him at the cost of the state.

Cases which have held that a witness at an investigatory hearing is not necessarily entitled to counsel have proceeded upon the assumption that his rights are well protected by the Fifth Amendment right to silence. *Anonymous Nos. 6 & 7 v. Baker*, 360 US 287, 296, 79 S.Ct. 1157, 1162 (1959); *In Re Groban's Petition*, 352 US 330, 333 77 S.Ct. 510, 513 (1957).

The right to counsel of one's choosing is not merely applicable to the trial of a criminal proceeding itself, but applies to any part of pre-trial proceedings where the absence of counsel would so prejudice the individual as to infect his subsequent trial with the absence of "that fundamental fairness essential to the very concept of justice." *Crooker v. State of California*, 347 US 433, 439, 78 S.Ct. 1287, 1292 (1958). This Court has invalidated several types of proceedings where counsel was not afforded. See, *e.g.*, *Glasser v. United States*, 315 US 60 (1942) and *Ferguson v. State of Georgia*, 365 US 570, 81 S.Ct. 756 (1961).

The reasons for the right to counsel were set forth well by this Court many years ago in *Johnson v. Zerbst*, 304 US 458, 463 (1938):

> "The '. . . right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.' The Sixth Amendment withholds from Federal Courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

While those statements were made in the context of a criminal charge already brought, they apply as well to the situation in which Petitioner finds himself. He has now been deprived of his right to silence under the Fifth Amendment, by the grant of immunity. Yet, that immunity is not all-encompassing. It still allows him to be prosecuted for perjury or false statement. Thus, his statements may cause him to be subjected to further criminal proceedings. This Court has clearly held that the Fifth Amendment privilege does not condone perjury. Yet, we would submit to the Court that a person may be charged with perjury and forced to defend himself even though he has attempted to answer all questions honestly and forthrightly. As shown to the District Court, this Petitioner has already been threatened with criminal charges against him, even though he has not said one word. The prosecutor has already told Petitioner's counsel that they know what the truth is, and that if Petitioner does not testify in conformity with their pre-formed concept of that truth, criminal proceedings will be brought against him. Significantly, this assertion has never been denied by the government.

The evidence in this record shows that the prosecution is not merely seeking information from Petitioner, but is seeking to force him to make statements upon which they can base a criminal prosecution. Petitioner desired to show at a hearing before the court that to appear before the Grand Jury, alone, without counsel, under these circumstances, makes it more likely that he will

give testimony which can be mistaken or erroneous, even though he honestly attempts to answer truthfully or in good faith. He was denied that opportunity. Clearly, in that circumstance, the grant of immunity does not give him the equivalence to the shield which the right to silence as afforded by the Fifth Amendment would. If allowed to remain silent, there is no possibility that he may commit perjury, since silence, at most is ambiguous. Such silence could never be used against him in any criminal proceeding. *Doyle v. Ohio*, 426 US 610, 618, 96 S.Ct. 2240, 2245 (1976).

The District Court and the Court of Appeals have now required Petitioner to speak, placing him in jeopardy of being accused of a criminal offense. The very act which would form the offense is being compelled by the court. To hold that this is not a critical stage of the proceedings is to ignore all reality. Certainly, the presence of counsel with whom one may confer so as to form his answers in a proper and appropriate manner could well prevent the witness from committing a crime. A more critical situation can hardly be imagined.

The courts have long recognized that psychological pressure may be just as coercive as physical torture. A hearing before the court would have given Petitioner an opportunity to show that the psychological pressures to which a witness is subjected before the Grand Jury are such as to make it imperative that counsel be present to guide him. As was observed by this Court in *Blackburn v. Alabama*, 361 US 199, 80 S.Ct. 274 (1960), "a prolonged interrogation of an accused who is ignorant of his rights and who has been cut off from the moral support of friends and relatives is not infrequently an effective technique of terror."

Respondent was deprived of even an opportunity to show to the District Court that the Grand Jury procedures as they existed in this case were so cooercive as to require the presence of counsel, as required under both the Fifth and Sixth Amendments. Not only may the witness not know how to represent himself, but he may unwittingly commit an act which is a crime, which could be forestalled and completely prevented if counsel were present to assist him in answering properly. Counsel may be necessary to object to tricky questioning, deliberately ambiguous statements, brow-beating, and the like. Indeed, the presence of counsel may not only make the difference between a perjury or false statement indictment being brought, but also the difference between guilt and innocence. What could possibly be more critical?

This Court has held that confessions which are involuntary are prohibited by the Fourteenth Amendment, not because they are unlikely to be true, but "because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the state must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers v. Richman*, 365 US 534, 81 S.Ct. 735 (1961). Where due process does not allow the government to extract an admission of guilt involuntarily from a person, how can it allow the government to extract the commission of an offense from one involuntarily?

Psychological pressure and mistreatment, while different from physical brutality, are just as abhorrent

and just as inimical to our free society and our basic concept of due process of law and justice. Respondent here was not even given an opportunity to introduce evidence to show that the pressures contemplated here would cause him such psychological pressures as to render the Grand Jury proceedings unfair without the guiding hand of counsel. At the very least he was entitled to present the evidence to support this claim. The District Court's justification that the evidence proffered by Petitioner might cause a change in the Grand Jury system as presently existing is no reason to deny him the most basic rights of due process—an opportunity to be heard in his own defense. The Court of Appeals' conclusion that this Court has not yet declared the right to counsel to be implicated by the Grand Jury proceedings is similarly no reason to deny this Petitioner the opportunity to show that such right should be implicated.

This Court must declare, at the very least, that Petitioner has the right to present the evidence which would support such a Constitutional argument.

CONCLUSION

The procedures which led to the jailing of Petitioner in this case are so devoid of due process as to be shocking. The issues raised by him were substantial, serious and of great Constitutional magnitude. They were brushed aside as if they did not exist. The peremptory jailing of Petitioner in violation of all procedural rights and safeguards was a flagrant denial of the basic tenets of our Constitution. The order of the United States Court of Appeals for the Seventh Circuit should be vacated and set aside and this cause should be remanded to the District Court with instructions to grant a full evidentiary hearing and in the interim to release Petitioner from custody.

Respectfully submitted,

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APPENDIX TO PETITIONER'S PETITION

APPENDIX "A".

Name of Presiding Judge,
Honorable JAMES B. PARSONS

Cause No. 79 C 474 Date February 14, 1979
Title of Cause In re: Dominic Blasi, a witness before the Special September 1978 Grand Jury

ORDER

* * * * *

Government's motion for Rule 6(e) disclosure to Mr. Milton Joseph is granted. It is hereby ordered that Dominic Blasi be committed to the Custody of the U.S. Marshall until the witness obeys this order or until the Grand Jury discontinues this investigation or shall have been discharged of this matter but under no circumstances shall the witness be detained more than 18 months.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
(Argued March 13, 1979)

March 16, 1979.

Before

Hon. THOMAS E. FAIRCHILD, *Chief Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*

IN RE: DOMINIC BLASI, a Witness before the Special September 1978 Grand Jury,

Respondent-Appellant.

No. 79-1162

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 79 C 474
JAMES B. PARSONS, *Judge.*

ORDER

This appeal is taken from a district court judgment finding the appellant, Dominic Blasi, to be in contempt for refusing to testify before the Special September 1978 Grand Jury after receiving a grant of immunity. For the reasons noted below, we affirm the judgment.

In his first major argument on appeal, Blasi challenges on due process grounds the procedures that were followed by the district court in granting him use immunity and ordering him to testify before the grand jury. These procedures are governed by 18 U.S.C. § 6003, which requires:

(1) that the Attorney General or Assistant Attorney General approve the U.S. Attorney's request for an order granting immunity to an individual; (2) that the testimony or other information from such individual is necessary to the public interest; and (3) that such individual has refused or is likely to refuse to testify on the basis of his privilege against self-incrimination.

In this case, the government's petition for an order granting immunity recited that the grand jury was conducting an investigation into alleged violations of 18 U.S.C. § 1962; that, in connection with this investigation, the appellant's testimony was necessary to the public interest; and that the appellant had appeared before the grand jury and asserted his privilege against self-incrimination. Attached to the petition was the approval of the designate of the Assistant Attorney General of the Criminal Division, Department of Justice. On the basis of this showing, the district court issued an order granting the appellant immunity.

Blasi argues, however, that these procedures were constitutionally deficient in two respects. First, he claims that the district court incorrectly interpreted its function in reviewing the immunity petition as one that is "purely ministerial." Second, he argues that the government's petition was inadequate because it failed to show that the questions asked of him were relevant to the grand jury investigation.

On the first point, this Court has clearly held that the district court's function in reviewing an immunity petition is indeed ministerial:

> "The United States Attorney determines whether a grant of immunity is in the public interest, and the district court may not review that judgment. The court may only scrutinize the record to ascertain that a request for immunity complies with the procedural and jurisdictional requirements of the statute. In these circumstances, there is little need for an adversary hearing before the court approves a request for immunity, because the court is exercising a ministerial function."

Ryan v. *C.I.R.*, 568 F.2d 531, 540 (7th Cir. 1977). As to the second claim, we agree with the Fourth Circuit that "when a witness has been granted the use immunity afforded by § 6002, the scope of the grand jury's investigation is immaterial insofar as the witness's Fifth Amendment privilege is concerned." *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973). This is true because the "scope of the use immunity afforded the witness corresponds with the scope of the information obtained from the witness." *Ryan* v. *C.I.R., supra* at 541. It follows, then, that, as a constitutional matter, the government need not amplify its allegations concerning the scope of the grand jury's investigation or the relevancy of the witness's testimony to that investigation. We thus find no constitutional defects in the procedures followed by the district court in granting the immunity petition.

The appellant next argues that the district court's failure to hold a full evidentiary hearing in the contempt proceedings denied him due process of law. In this connection, it is clear that a witness bears the burden of showing why he should not be confined for contempt once the government alleges that the witness was granted immunity and thereafter refused to answer questions on the basis of his Fifth Amendment privilege. *United States* v. *Handler*, 476 F.2d 709, 713 (2d Cir. 1973). It is equally clear that such a witness should be given a "meaningful opportunity to raise his claims [and have] them determined by the court." *In re Bonk*, 527 F.2d 120, 127 (7th Cir. 1975).

To say this, however, is not to say that a determination of just cause cannot be made in the absence of a full evidentiary hearing. On the contrary, the courts have consistently held that an evidentiary hearing is appropriate only if the witness's defense raises legal or factual issues of some complexity. See, *e.g., In re Sadin*, 509 F.2d 1252, 1256 (2d Cir. 1975); *In re Grand Jury Proceedings*, 550 F. 2d 1240, 1242 (3d Cir. 1977); *United States* v. *Alter*, 482 F. 2d 1016, 1023 (9th Cir. 1973).

From our review of the record, we are persuaded that the appellant had an adequate opportunity to raise his claims and have them determined by the court. Furthermore, we do not find that any of the factual or legal issues were of such complexity as to require an evidentiary hearing. We therefore conclude that the contempt proceedings satisfied the requirements of due process.

As to the merits of the proceedings, we find no basis for reversing the district court's conclusion that Blasi had failed to show cause for refusing to testify. The appellant appears to argue that the grant of immunity was not coextensive with the privilege against self-incrimination since he was still subject to prosecution for perjury. The short answer to this argument is found in the Supreme Court's decision in *Kastigar* v. *United States*, 406 U.S. 441 (1972):

> "We conclude that the immunity provided by 18 U.S.C. 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it."

Id. at 462. Furthermore, this Court has consistently held that a prosecution for perjury is constitutionally permissible, even if the false statements are made while the witness is testifying under a grant of immunity. See, *e.g., In re Daley*, 549 F.2d 469, 481-82 (7th Cir. 1976); *United States* v. *Patrick*, 542 F.2d 381, 385 (7th Cir. 1976); *In re Bonk*, 527 F.2d 120, 125 (7th Cir. 1975).

The appellant also claims that he was impermissibly denied the assistance of counsel in the grand jury room. It is now clear, however, that a majority of the Supreme Court finds no constitutional basis for a right to the assistance of counsel in the grand jury room. Four members of the Court have held that the constitutional right to counsel is not implicated by grand jury proceedings, *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976), while a fifth has suggested only that there is a constitutionally derived right

to have counsel present for consultation outside the grand jury room. *Id.* at 608 (Brennan, J., concurring). In this case, the appellant was given the opportunity to consult with counsel outside the grand jury room at any time. Accordingly, we find no constitutional error.

We have examined the appellant's other arguments, and find them without merit. We do grant, however, the appellant's motion to strike additional portions of the record on the grounds that the documents were never made a part of the proceedings in the district court, and we do not find it necessary to consider them in reaching this opinion.

The judgment of the district court is

AFFIRMED.

No. 78-1857

In the Supreme Court of the United States

OCTOBER TERM, 1978

DOMINIC BLASI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-6a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1979. The petition for a writ of certiorari was filed on June 13, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a witness before a grand jury has a right under the Fifth or Sixth Amendment to have counsel accompany him into the grand jury room.

2. Whether use and derivative use immunity granted pursuant to 18 U.S.C. 6002 and 6003 is co-extensive with the scope of the privilege against self-incrimination guaranteed by the Fifth Amendment and is therefore sufficient to compel testimony over a claim of privilege.

3. Whether the procedures followed by the district court in holding petitioner in civil contempt were adequate.

STATEMENT

On October 25, 1978, petitioner was summoned to testify before a federal grand jury in the Northern District of Illinois that was conducting an investigation into alleged racketeering activities in violation of 18 U.S.C. 1962. Petitioner asserted his Fifth Amendment privilege against compulsory self-incrimination and refused to answer any questions (Tr. 3).[1] On the morning of January 31, 1979, petitioner was granted immunity under 18 U.S.C. 6002 and 6003 (Tr. 10-11). That same day, when petitioner appeared before the grand jury, he again asserted his privilege against compulsory self-incrimination and refused to answer any questions (Tr. 17). Later that afternoon, the prosecutor orally petitioned the district court for a rule to show cause why petitioner should not be held in civil contempt (Tr. 17-18). The court granted the show cause petition, ordered that a written petition be filed, and set a hearing on the petition for the morning of February 7, 1979, the day on which the grand jury was to return (Tr. 18-19).

On February 6, 1979, four days after the government filed its written petition for a show cause order and six

[1] "Tr." refers to the transcript of proceedings before the district court on January 31, 1979, and February 6, 9 and 14, 1979.

days after the court granted the government's oral petition, counsel for petitioner requested a continuance of the contempt hearing (Tr. 24). The court directed counsel to file a written response to the contempt petition by February 8, 1979, and announced its intention to determine on the basis of the petition and response whether a full evidentiary hearing on the defenses raised by petitioner would be necessary (Tr. 36-37).

In his response, petitioner challenged the constitutionality of the immunity statutes and asserted that he had been denied his constitutional right to the assistance of counsel in the grand jury room (see Pet. 5-6). The contempt hearing resumed on February 9, 1979. The district court observed (Tr. 41) that the constitutionality of the immunity statutes had already been sustained by this Court. Accordingly, after hearing petitioner's proffer of testimony and arguments of counsel, the court held that no issue requiring a full hearing had been presented (Tr. 41-51). The court several times stressed that petitioner did not argue that the trauma of testifying under an immunity grant would have any unique impact on him, an issue on which the court was prepared to hold a full evidentiary hearing (Tr. 43, 48, 50, 59). Petitioner was ordered to reappear before the grand jury on February 14, 1979, to be given another opportunity to testify (Tr. 51-52).

On that date, petitioner appeared before the grand jury for the third time and continued to assert his Fifth Amendment privilege (Tr. 55). Petitioner then appeared before the district court and renewed his request for a plenary hearing on his asserted defenses (Tr. 56-59), which the court denied (Tr. 59). The questions petitioner had refused to answer were read into the record (Tr. 63-67). After petitioner declined a final opportunity to testify, the

court adjudged him in civil contempt and committed him to the custody of the United States Marshal until he obeyed the order to testify or until the grand jury discontinued its investigation (Pet. App. 1a; Tr. 67-68).

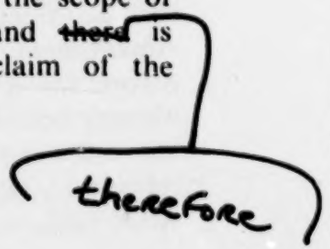
ARGUMENT

1. Petitioner's argument (Pet. 16-22) that he had a constitutional right to the presence of counsel in the grand jury room was properly rejected by the court of appeals. As the court noted (Pet. App. 5a-6a):

> Four members of the Court have held that the constitutional right to counsel is not implicated by grand jury proceedings, *United States* v. *Mandujano*, 425 U.S. 564, 581 (1976), while a fifth had suggested only that there is a constitutionally derived right to have counsel present for consultation outside the grand jury room. *Id.* at 608 (Brennan, J., concurring). In this case [petitioner] was given the opportunity to consult with counsel outside the grand jury room at any time. Accordingly, we find no constitutional error.

See also *In re Groban*, 352 U.S. 330, 333 (1957).

2. Similarly, petitioner's contention (Pet. 12-16) that the immunity granted by 18 U.S.C. 6002 and 6003 is not sufficient to supplant the Fifth Amendment privilege is foreclosed by *Kastigar* v. *United States*, 406 U.S. 441 (1972), in which the Court held that "such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and ~~there~~ is sufficient to compel testimony over a claim of the privilege." *Id.* at 453.



Congress has carved out of the use immunity provision in 18 U.S.C. 6002 an exception permitting the use of compelled testimony or information in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." The constitutionality of this exception cannot be doubted. "[I]t cannot be conceived that there is power to compel the giving of testimony where no right exists to require that the testimony shall be given under such circumstances and safeguards as to compel it to be truthful." *Glickstein* v. *United States*, 222 U.S. 139, 142 (1911), quoted in *United States* v. *Mandujano*, 425 U.S. 564, 578 (1976) (plurality opinion). See also *id.* at 584-585 (Brennan, J., concurring); *id.* at 609 (Stewart, J., concurring). *United States* v. *Wong*, 431 U.S. 174, 178 (1977).

Nevertheless, petitioner maintains that he should have been permitted to introduce evidence at his contempt hearing to demonstrate that use and derivative use immunity is not in fact co-extensive with the rights guaranteed by the Fifth Amendment because of the possible use in a subsequent perjury or false statement prosecution of testimony or information furnished under a grant of immunity. Petitioner argues that testimony before a grand jury is necessarily based on the witness' memory and powers of observation, which are in turn dependent upon a number of variables in the mental process and which are subject to subconscious distortion deriving from the emotional needs of the individual in question. Thus, because a witness before a grand jury is under great tension, anxiety, and stress, he might be led to answer a question honestly as he remembered, but nevertheless, incorrectly. Petitioner concludes that the risk that a witness might subsequently be subject to prosecution for perjury, even though he did not intentionally answer the questions falsely, renders the immunity insufficient to supplant the Fifth Amendment privilege (Pet. 14).

Petitioner's contention is, as explained above, foreclosed by the holding in *Glickstein* that a witness testifying under a grant of immunity may be prosecuted for perjury. The result in *Glickstein* was not based, as petitioner appears to suggest (Pet. 13, 15), on the Court's impressions or factual assumptions about the pressures to which grand jury witnesses are generally subject and their likely reaction to those pressures. It was based instead on the recognized need of the government to compel testimony in certain circumstances (222 U.S. at 141) and the conclusion that "an authority which can only extend to the licensing of perjury is not a power to compel the giving of testimony. Of course, these propositions being true, it is also true that the immunity afforded by the constitutional guarantee relates to the past and does not endow the person who testifies with a license to commit perjury." *Id.* at 142. The district court therefore correctly concluded (Tr. 41) that petitioner's argument has been "preempted" by this Court's decisions[2] and properly declined to permit petitioner the opportunity to present evidence to establish the factual premises for that argument.[3]

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[2]The proper occasion for a witness to raise the argument that the pressures of a grand jury appearance may lead to unintentional false statements would be in connection with a subsequent prosecution for perjury, not in seeking to avoid testifying altogether. *In re Grand Jury Proceedings*, 539 F. 2d 382, 384 (5th Cir. 1976).

[3]Moreover, although the district court observed that petitioner's claim had been "preempted" by this Court, it allowed petitioner to proffer testimony of what he sought to show in this connection, *i.e.*, that the psychological stress upon a witness was such that it could adversely affect his memory and ability to tell the truth, perhaps causing him to testify falsely and thereby to subject himself to a perjury prosecution (Tr. 41-51; Pet. 13-14). The court took judicial notice (Tr. 41-42) of the psychological impact of testifying upon a grand jury witness and again concluded (Tr. 58-59) that its decision would remain unaltered.

3. There also is no merit to petitioner's assertion (Pet. 8-11) that the district court deprived him of due process in holding him in contempt. Under 28 U.S.C. 1826, a district court may adjudge in contempt a witness who refuses "without just cause shown to comply with an order of the court." The witness must be given notice and "the opportunity of presenting all defenses properly available to him." *In re Grand Jury Investigation*, 545 F. 2d 385, 388 (3d Cir. 1976), quoting *In re Grand Jury Investigation* (*Schofield I*), 486 F. 2d 85, 91 (3d Cir. 1973). See also *United States* v. *Alter*, 482 F. 2d 1016, 1023-1024 (9th Cir. 1973). As explained above, petitioner's asserted defenses of the right to presence of counsel in the grand jury room and the unconstitutionality of the immunity statutes were not "available to him."

Contrary to petitioner's contention, a plenary hearing is not always warranted. Rather "[t]he test is whether [the witness] had an adequate opportunity to raise his claims and have them determined by the court." *In re Bonk*, 527 F. 2d 120, 127 (7th Cir.), stay denied, 423 U.S. 942 (1975); *In re Sadin*, 509 F. 2d 1252, 1255-1256 (2d Cir. 1975). In the present case, a period of eight days elapsed between January 31, 1979, the date on which the district court granted the government's petition for a rule to show cause why petitioner should not be held in contempt, and February 8, 1979, when petitioner filed his response to the petition. This period of time is certainly reasonable for the preparation of a defense. See *In re Weeks*, 570 F. 2d 244, 247 (8th Cir. 1978), and cases cited. Petitioner was given an opportunity to raise and did raise his defenses, but the court correctly rejected them as a matter of law. The hearing afforded petitioner thus was sufficient to satisfy due process. See *In re Grand Jury Proceedings*, 550 F. 2d 1240, 1242-1243 (3d Cir. 1977); *In re Sadin*, *supra*, 509 F. 2d at 1256; cf. *United States* v. *Alter*, *supra*, 482 F. 2d at 1023-1024.

Petitioner relies in part on *United States* v. *Dinsio*, 468 F. 2d 1392 (9th Cir. 1972), for the proposition that he was entitled to a full evidentiary hearing. That case, however, is inapposite. The defendant in *Dinsio* was held in contempt for refusing to provide finger and palm print exemplars to the grand jury. The prosecutor submitted *in camera* an affidavit of an FBI agent to show that the grand jury request was reasonable. No hearing was held and defense counsel was denied the opportunity both to inspect the affidavit and examine the affiant. In those circumstances, the court held that the witness was entitled to an "uninhibited and adversary hearing" in order to show "just cause." Here, there are no factual issues in dispute regarding any "just cause" for petitioner's failure to testify. Moreover, the correctness of the *Dinsio* decision has been questioned in a later decision by the Ninth Circuit. *In re Braughton*, 520 F. 2d 765, 767 (1975).

Petitioner also cites *In re Sadin, supra,* for the proposition that he was entitled to a hearing and that there is a conflict among the circuits regarding the rights of potential contemnors (Pet. 11). However, that case merely held that the recalcitrant witness has a right to a reasonable time within which to prepare a defense. It did not suggest that a full evidentiary hearing is required where the defenses raised are without merit as a matter of law. See 509 F. 2d at 1256.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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